

Spring 1990

An Un-Fortune-ate Decision: The Aftermath of the Supreme Court's Eradication of the Relation-Back Doctrine

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Lawrence A. Epter, *An Un-Fortune-ate Decision: The Aftermath of the Supreme Court's Eradication of the Relation-Back Doctrine*, 17 Fla. St. U. L. Rev. 713 (2017) .
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AN UN-FORTUNE-ATE DECISION: THE AFTERMATH OF THE SUPREME COURT'S ERADICATION OF THE RELATION-BACK DOCTRINE†

LAWRENCE A. EPTER

In Schiavone v. Fortune, the United States Supreme Court held that the "period provided by law for commencing the action" language of Federal Rule of Civil Procedure 15(c) includes the statutory limitation period, but not the time allowed for service of process. After demonstrating that this interpretation of Rule 15(c) is unreasonable, the author of this Article examines the various ways that federal courts have dealt with the decision. In light of the confusion and inequities which have resulted, the author suggests two ways of effecting a more just and sensible reading of Rule 15(c).

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AN UN-FORTUNE-ATE DECISION: THE AFTERMATH OF THE SUPREME COURT'S ERADICATION OF THE RELATION-BACK DOCTRINE

LAWRENCE A. EPTER*

A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.¹

WHILE these sentiments make good sense, the procedural aspects of attaining adjudication on the merits in federal court often appear to be "rules" of a very complex game, particularly to the losing litigant who fails to satisfactorily play by the rules and is thus prevented from exercising the legal right(s) the litigant once had. It is extremely important, therefore, to understand the Federal Rules of Civil Procedure and their application when one prepares to engage in the complex legal game we might call "procedural litigation."

One often litigated and not easily resolved procedural issue involves the situation in which a complaint that fails to satisfy a particular pleading requirement is filed within the statutorily prescribed period, and an attempt to amend the complaint is made after the statutory period has run. The litigation centers on whether the new matter as-

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1. *United States v. A. H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947). In *Fischer*, an action was brought by the government against "A. H. Fischer Lumber Company." *Id.* The defendant's registered name was "A. H. Fischer Company." *Id.* Defendant moved to dismiss the action on the ground that the complaint had not properly named the defendant. *Id.* The trial court denied the government's motion for leave to amend to strike the word "Lumber" from its complaint and dismissed the action. *Id.* Plaintiff later filed a second action, this time denoting defendant as "A. H. Fischer Company, Inc." *Id.* Again the trial court refused leave to amend to strike the word "Inc." and dismissed the action. *Id.* With Judge Parker writing for the majority, the United States Court of Appeals for the Fourth Circuit reversed both dismissals, holding that nobody was misled by either improper designation where the defendant was engaged in the lumber business and there was no other corporation in the locality with a similar name. *Id.*

serted by the amendment should "relate back" to the original filing of the complaint and thus be included in the record, or rather, whether the new matter is barred by the statute of limitations, with the consequence of barring the entire suit due to an inadequate original complaint. In this regard, Federal Rule of Civil Procedure 15(c) sets forth the standards which federal courts utilize in deciding whether the relation-back doctrine may be equitably applied; i.e., whether new matter asserted by an amendment after the running of the statute of limitations will be allowed.² The rule was amended in 1966 to define criteria which would help to create the uniformity in federal court interpretation which was lacking under the pre-1966 rule.³ Unfortunately, conflicting interpretations of these criteria have led to uncertainty regarding the true meaning of this doctrine.⁴

Much has been written about the proper application of each element of Rule 15(c).⁵ While some sporadic results have been reached under amended Rule 15(c), the relation-back doctrine is not a source of ongoing legal debate. However, one aspect of Rule 15(c) has created a widespread heated conflict throughout the federal appellate courts and the legal community generally: What is the "period provided by law for commencing the action" as that term is used in Rule 15(c)? This Article focuses on the resolution of this issue.

2. Rule 15(c), Federal Rules of Civil Procedure, provides in part that:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Id.

3. *Id.* advisory committee's note. Pre-amended Rule 15(c) consisted of only the first sentence of the present rule.

4. For a discussion of the inconsistent results reached in the federal courts under pre-amended Rule 15(c), see *infra* text accompanying notes 18-35.

5. This Article focuses on the conflicting interpretations of the "period provided by law for commencing the action" language which led to the Supreme Court's decision in *Schiavone v. Fortune*, 477 U.S. 21 (1986). It then discusses and analyzes the facts and holding of *Schiavone*. The sometimes inconsistent results relating to the application of other aspects of Rule 15(c) are comprehensively discussed in the following sources: J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 5.27 (1985) [hereinafter FRIEDENTHAL]; 3 J. MOORE, MOORE'S FEDERAL PRACTICE § 15.15 (2d ed. 1989) [hereinafter MOORE]; 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1496-1510 (1971 & Supp. 1989) [hereinafter WRIGHT]; Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 MINN. L. REV. 83 (1972).

At first glance, the ramifications of resolving this issue may appear to be neither severe nor far-reaching. However, when one considers that a great number of lawsuits are filed on or near the expiration date of the limitations period, the interpretation of the language in Rule 15(c) will determine whether the omission or misdesignation of a party (both of which frequently occur) is fatal or, on the other hand, tolerable. Furthermore, interpretation of the Rule 15(c) time period will create either consistency or irreconcilable conflict between the relation-back doctrine and the underlying policies and clear mandates pervading the Federal Rules of Civil Procedure.

A background section exploring the relationship of Rule 15(c) with the underlying policies of statutes of limitations and Rule 15(a) is included in this Article to allow for a full understanding of the relation-back doctrine. Next, the specific issue of interpretation of the "period provided by law" language which has spawned conflict throughout the legal community is explored through an analysis of the contrasting federal cases creating the debate. The United States Supreme Court's unfortunate decision in *Schiavone v. Fortune*,⁶ as well as its aftermath, is then critically analyzed. Lastly, a proposal for reform designed to restore the intended meaning and purpose to the relation-back doctrine is set forth.

I. BACKGROUND

Rule 15(c) and the statutes of limitations are technically in diametric opposition to each other: the successful operation of one leads to virtual abrogation of the other where both are at issue in a case. Every time a court allows an amendment filed after the expiration of a limitations period to relate back, the policies of the statute of limitations have been unfavorably balanced against the equities of the particular situation. To fully understand Rule 15(c), one must, therefore, understand the policies on which limitations periods are based.

The primary purpose of a limitations period is to compel timely institution of an action so that the opposing party may adequately prepare a defense.⁷ This facilitates the goal of efficient judicial administration through the avoidance of difficult and arbitrary resolu-

6. 477 U.S. 21 (1986).

7. Note, *supra* note 5, at 84 (citing *Housing Authority v. Commonwealth Trust Co.*, 25 N.J. 330, 136 A.2d 401 (1957)). Delayed institution of an action could prejudice a party in defending the case. Stolen or lost evidence as well as lost accessibility to witnesses because of removal from a jurisdiction or death serve as examples. *Id.*; see, e.g., *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (statutes of limitations spare litigants from being put to defense after memories have faded, witnesses have died and evidence has been lost); *Pearson v. Northeast Airlines*, 309 F.2d 553, 558 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

tion of stale claims that would arise if untimely causes of action were permitted.⁸ Second, a statutory period lessens the disruptive effect unsettled claims may have on commercial dealings.⁹ Finally, the limitations period relieves a party from what would otherwise be endless psychological fear of litigation based on events of the distant past.¹⁰

The objective of Rule 15 as a whole is to allow the liberal use of amendments to the pleadings to facilitate the proper presentation of a case and to promote adjudication through litigation on the merits.¹¹ Rule 15 also serves the purpose of allowing amendments for clarification and/or correction of the original complaint without being barred by the statute of limitations. Restrictions in the application of Rule 15 are often imposed in deference to the ever important policy concerns underlying the need for limitations periods.

There is substantial interplay between Rule 15(c) and Rule 15(a) since relation-back will be allowed only if it does not violate Rule 15(a).¹² Therefore, an examination of Rule 15(a) is necessary for a full understanding of the relation-back doctrine. Rule 15(a) permits a pleading to be amended once as a matter of right so long as no responsive pleading has been filed or, if the original pleading did not require a response, within the normal time in which responsive pleadings are required, regardless of whether the amendment precedes the expiration of the limitations period.¹³ The section of Rule 15(a) pertain-

8. Note, *supra* note 5, at 85 (citation omitted).

9. See *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950); Note, *supra* note 5, at 85 (citing *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring)).

10. Note, *supra* note 5, at 84 (citing *Pearson v. Northeast Airlines*, 309 F.2d 553, 559 n.13 (2d Cir. 1962) (statutes of limitations embody concern for protection of defendant from protracted fear of litigation—seems to be reason wrongful death limitations periods are usually shorter than the ordinary period for negligent tort actions), *cert. denied*, 372 U.S. 912 (1963)).

11. See generally MOORE, *supra* note 5, § 15.02[1]. Rule 15 is among the most important procedural rules in emphasizing and attaining the objective of adjudication of claims on the merits. *Id.*; see also *Conley v. Gibson*, 355 U.S. 41, 42-48 (1957). In *Conley*, the Court restated the goal of civil procedure as the narrowing and refinement of facts and issues to facilitate adjudication on the merits. *Id.* In support of this notion, the Court cited a litany of Federal Rules of Civil Procedure which are supposed to facilitate this objective, Rule 15(c) being one of those cited. See *id.* at 48 n.9.

12. The conceptual relationship between the two provisions can be seen in the general statement that leave to amend is "freely given when justice so requires." FED. R. CIV. P. 15(a). While Rule 15(a) states the proposition, Rule 15(c) defines "when justice so requires" in cases involving the relation-back of amendments. *Id.* 15(c).

13. A responsive pleading is one which joins issues and replies to a prior pleading of an opponent. BLACK'S LAW DICTIONARY 1180 (5th ed. 1979). Rule 7(a), Federal Rules of Civil Procedure, defines when responsive pleadings are required:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provi-

nent to Rule 15(c) states "[o]therwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when *justice so requires*."¹⁴ Even though the rule confers discretion on the court to deny leave, it is to be freely given, especially when sought reasonably early in the proceedings since the opposing party will have a fair opportunity to adjust to the new allegations.¹⁵

sions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

FED. R. CIV. P. 7(a).

Today, many jurisdictions do not allow additional pleadings after the answer, subject only to the court's power to make a specific order requiring the plaintiff to file a reply, which is rarely done. FRIEDENTHAL, *supra* note 5, § 5.31; *see also* FED. R. CIV. P. 7(a). *But see* CAL. CIV. PROC. CODE § 422.10 (West 1987) (court is not even given the power to order a reply).

Federal Rule of Civil Procedure 12(a) defines the allowable time periods for service of a responsive pleading:

A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

FED. R. CIV. P. 12(a).

14. FED. R. CIV. P. 15(a) (emphasis added). In its entirety, Rule 15(a) states that:

(a) **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Id.

15. FRIEDENTHAL, *supra* note 5, § 5.26. *Compare* Posz v. Burchell, 209 Cal. App. 2d 324, 25 Cal. Rptr. 896 (Dist. Ct. App. 1962) (law allows substantial liberality in amendments prior to and during trial) and Landis v. Superior Court, 232 Cal. App. 2d 548, 42 Cal. Rptr. 893 (Dist. Ct. App. 1965) (courts should liberally grant amendments to not deprive party of day in court by technicalities) with Bedolla v. Logan & Frazee, 52 Cal. App. 3d 118, 125 Cal. Rptr. 59 (Dist. Ct.

Courts have examined whether there is a showing of undue prejudice to the non-moving party when analyzing if "justice so requires."¹⁶ Where the non-moving party will not be prejudiced, where the movant is and has been acting in good faith, and where the trial will not suffer undue delay, a court will allow the amendment in order to facilitate a decision on the merits.¹⁷

To attain the goal of clarification of proper application of the relation-back doctrine, the second sentence of Rule 15(c) was added by the 1966 amendment.¹⁸ Prior to this amendment, many federal courts relied on the rule, which consisted of only the first sentence of the present text, to reach logical and just results by allowing amendments changing parties to relate back.¹⁹ The first sentence simply states that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."²⁰ Equitable results were reached under the pre-amended Rule 15(c).²¹ However, a number of

App. 1975) (long delayed presentation of amendment without excuse is significant factor in denying leave to amend).

16. See *Harkless v. Sweeney Indep. School Dist.*, 554 F.2d 1353, 1360 (5th Cir.) (trial court did not abuse discretion in denying leave to black school teachers to amend civil rights complaint to rejoin individual defendants in their unofficial capacities on ground that this would cause defendants undue prejudice), *cert. denied*, 434 U.S. 966 (1977); *United Steelworkers v. Mesker Bros.*, 457 F.2d 91, 94 (8th Cir. 1972) (if defendants do not allege any prejudice which would result by granting leave to amend and motion is not futile, it should be granted). Regarding this issue, the Supreme Court stated:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

17. Rule 15, in conjunction with other Federal Rules of Civil Procedure, establishes a design for the purpose of facilitating adjudication of every action on the merits. See, e.g., FED. R. CIV. P. 1 (the rules "shall be construed to serve the just, speedy, and inexpensive determination of every action"); *id.* 8(f) ("[a]ll pleadings shall be so construed as to do substantial justice"); *id.* 61 ("[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"); see also *Chamberlin v. United Engineers & Constructors*, 194 F. Supp. 647, 647-48 (E.D. Pa. 1961) (complaints may be freely amended where amendment has some foundation in fact and, therefore, cannot be considered frivolous or sham).

18. FED. R. CIV. P. 15(c) advisory committee's note.

19. WRIGHT, *supra* note 5, § 1498, at 506.

20. FED. R. CIV. P. 15(c).

21. See *Fidelity & Deposit Co. v. Fitzgerald*, 272 F.2d 121, 123 (10th Cir. 1959) (where amendment substitutes original plaintiff with one bearing some relation of interest to the original

claims which should have been decided on the merits were technically defeated through an overly literal reading of Rule 15(c).²²

Perhaps the harshest result under pre-amended Rule 15(c) was reached in *Kerner v. Rackmill*.²³ In *Kerner*, the complaint denoted the defendant as an individual conducting business under the name of "Malibou Dude Ranch."²⁴ Subsequent to the running of the limitations period, plaintiff discovered that the individual was an agent of a corporation, "Malibou Dude Ranch, Inc.," which owned the business plaintiff sought to sue.²⁵ Despite the fact that the original party sued was competent to receive service on behalf of the corporation, the District Court of Pennsylvania held that the amendment to add the corporation as a defendant would not relate back because relation-back would bring in a "new" defendant who would be materially prejudiced by the deprivation of the statute of limitation defense.²⁶

Harsh results also frequently occurred when private parties tried to sue instrumentalities of the federal government. In *Cohn v. Federal*

plaintiff, the claim or cause of action does not change and amendment relates back to commencement of action or filing of claim), *cert. denied*, 362 U.S. 919 (1960); *Gifford v. Wichita Falls & S. Ry.*, 224 F.2d 374 (5th Cir.) (where railroad company had acquired all assets of railway company, but injured railroad company employee instituted personal injury action against railway company, employee could amend complaint to substitute railroad company as defendant since both corporations had joint offices and employees and were aware of pendency of action from beginning), *cert denied*, 350 U.S. 895 (1955); *Lackowitz v. Lummus Co.*, 189 F. Supp. 762 (E.D. Pa. 1960) (where wholly-owned subsidiary was dissolved and all assets were transferred to company which was division of parent corporation, and diversity tort action was instituted against subsidiary, but complaint correctly indicated state of incorporation and location of principal office of parent corporation and location of office of division, plaintiff who served agent of division was merely mistaken as to name of defendant and was entitled to amend complaint by changing name of defendant after statute of limitations had run on plaintiff's cause of action); *Smith v. Potomac Edison Co.*, 165 F. Supp. 681, 682 (D. Md. 1958) (in view of fact that equitable plaintiffs, facts alleged, nature of alleged cause of action, and measure of damages would remain the same in amended complaint naming state as nominal plaintiff, amendment would relate back to filing of suit even though amended complaint was filed after expiration of limitations period); *Zielinski v. Philadelphia Piers, Inc.*, 139 F. Supp. 408 (E.D. Pa. 1956) (where plaintiff sued wrong defendant supposing him to be employer of allegedly negligent vehicle driver, and such named defendant, according to its answers to interrogatories, made prompt investigation of accident and was represented by its insurance company from commencement of suit and same insurer insured true employer, there was no prejudice to such defendant which would preclude pretrial order which limited issues and had effect of requiring such defendant, on ground of estoppel and inadequacy of answer, to defend action after action against true employer was barred by time limitation).

22. See, e.g., *Jacobs v. McCloskey & Co.*, 40 F.R.D. 486 (E.D. Pa. 1966) (no identity of interest between parent and wholly-owned subsidiary); *Martz v. Miller Bros.*, 244 F. Supp. 246 (D. Del. 1965) (no identity of interest between corporations with same officers with the exception of the secretary).

23. 111 F. Supp. 150 (M.D. Pa. 1953).

24. *Id.* at 151.

25. *Id.*

26. *Id.* at 152.

Security Administration,²⁷ a plaintiff who was denied social security benefits by the Secretary of Health, Education and Welfare sought review of the decision by bringing suit against that office within sixty days pursuant to 42 U.S.C. § 405(g).²⁸ In this and similar cases,²⁹ plaintiffs instituted timely actions but erred in naming the United States, the Department of Health, Education and Welfare, the "Federal Security Administration" (a nonexistent agency), and a secretary that retired nineteen days before. The court denied plaintiff's motion to amend the complaint after the sixty-day period on the ground that the amendment would amount to commencement of a new claim subsequent to the running of the statute of limitations.³⁰

The Advisory Committee on Civil Rules (Advisory Committee) criticized these decisions since the government was put on notice within the statutory period, thereby not offending the policy concerns of limitation periods.³¹ The Advisory Committee stated that "characterization of the amendment as a new proceeding is not responsive to the reality, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case."³² The Advisory Committee stated that through the 1966 amendments, Rule 15(c) was "amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall 'relate back' to the date of the original pleading."³³ According to one court, "[t]he 1966 amendment simply clarifies, by explicitly stating, the permissive procedure and its appropriate safeguards which have existed under Rule 15(c) since its promulgation."³⁴ To protect against the inherent inequities in decisions such as these from becoming commonplace and to try to create consistent treatment of the relation-back doctrine, Rule 15(c) was amended.³⁵

As amended, Rule 15(c) provides in pertinent part that where a litigant seeks to change the party against whom a claim is asserted, rela-

27. 199 F. Supp. 884 (W.D.N.Y. 1961).

28. *Id.* at 884.

29. See *Hall v. Department of H.E.W.*, 199 F. Supp. 833 (S.D. Tex. 1960); *Cunningham v. United States*, 199 F. Supp. 541 (W.D. Mo. 1958).

30. *Cohn*, 199 F. Supp. at 885.

31. FED. R. CIV. P. 15(c) advisory committee's note.

32. *Id.* For an expansive discussion of this issue, see Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40 (1963).

33. FED. R. CIV. P. 15(c) advisory committee's note.

34. *Travelers Indem. Co. v. United States for the Use of Constr. Specialties Co.*, 382 F.2d 103, 106 (10th Cir. 1967).

35. WRIGHT, *supra* note 5, § 1498, at 507.

tion-back is dependent upon the satisfaction of the following factors: (1) the claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) the party knew or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must be fulfilled within the period provided by law for commencing the action.³⁶ Amended Rule 15(c) therefore creates an exception to the general rule established in the courts that new parties, whether plaintiffs³⁷ or defendants,³⁸ cannot be added to a proceeding after the applicable statute of limitations has run. However, the certainty and consistency in the application and interpretation of the rules which the Advisory Committee hoped for has not been achieved. Instead, varied interpretations have led to frequently inconsistent results.³⁹ It is important, then, to reach a logical understanding of each element of amended Rule 15(c), thereby developing a sound analytical base to appropriately analyze relation-back issues.⁴⁰

II. INTERPRETATION AND ANALYSIS OF RULE 15(C)'S "PERIOD PROVIDED BY LAW FOR COMMENCING THE ACTION"

Amended Rule 15(c) states that the requirements set forth in 15(c)(1) and 15(c)(2)⁴¹ must be fulfilled "within the period provided by law for commencing the action."⁴² The crucial interpretative issue when construing this language is whether the defendant must receive notice within the statute of limitations period or within the time period allowable for service of process when the action has been filed

36. FED. R. CIV. P. 15(c). The amendment also provides that:

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Id.

37. See, e.g., *Hernandez Jimenez v. Calero Toledo*, 576 F.2d 402, 405 n.3 (1st Cir. 1978) (citing *WRIGHT*, *supra* note 5, § 1498).

38. See, *WRIGHT*, *supra* note 5, § 1498.

39. See *supra* text accompanying note 5.

40. Analysis of the elements of Rule 15(c) not relating to the "period provided by law" is beyond the scope of this Article. A full discussion of these aspects of Rule 15(c) can be found in the sources cited *supra* at note 5.

41. For the relevant portions of Rule 15(c), see *supra* note 2.

42. FED. R. CIV. P. 15(c).

within the limitations period but service is accomplished after the statute has run.⁴³

A. *Origin of the Conflict: Martz and Ingram*

The disagreement in federal courts is exemplified by a comparison of two cases directly on point: *Martz v. Miller Bros.*⁴⁴ and *Ingram v. Kumar.*⁴⁵ In *Martz*, the plaintiff suffered injuries when building material fell on him as he was passing on a sidewalk adjacent to Miller Brother's Furniture Store in Newark, Delaware.⁴⁶ Martz filed a complaint against Miller Brothers Company two days prior to the running of the statute of limitations, and service of process was effected three days after its expiration on Bruno de Polo, the corporation's secretary.⁴⁷ Shortly thereafter, the plaintiff discovered that the premises upon which the injury took place were owned by Miller Brothers Company of Newark, a corporation legally distinct from Miller Brothers Company.⁴⁸ However, the two corporations were affiliated in that they had the same officers with the exception of de Polo.⁴⁹ The plaintiff filed a motion seeking leave to amend his complaint to properly designate the defendant.⁵⁰

The issue presented in *Martz* was whether the "within the period provided by law" language of Rule 15(c) was to be interpreted as the applicable statutory limitations period or the statutory period *plus* the time permitted for service of process. The critical nature of this inquiry is evidenced by the differing results reached by application of each possibility to *Martz*. If the latter reading of the rule were applied, the language of Rule 15(c) would be satisfied since service of process was effected well within the time allowable. However, if the former reading were applied, plaintiff's claim would be foreclosed

43. FRIEDENTHAL, *supra* note 5, at 307 n.15.

44. 244 F. Supp. 246 (D. Del. 1965).

45. 585 F.2d 566 (2d Cir. 1978).

46. *Martz*, 244 F. Supp. at 247-48.

47. *Id.* at 248.

48. *Id.*

49. *Id.* DePolo was only an officer of Miller Bros. and not of Miller of Newark. *Id.*

50. *Id.* As is often the case in relation-back litigation, the plaintiff's motion for leave to amend was followed by the defendant's motion for summary judgment. *Id.* The motions are interrelated in that they both turn on the same central issue: whether the court will permit an amendment to the name of the defendant to relate back to the time of the original complaint. *Id.* If the motion for leave to amend is denied, the statute of limitations will have run on plaintiff's claim. If the motion is granted, the court effectively sustains the plaintiff's cause of action. "The question can be looked at in two contexts: (1) whether the expiration of the limitation period precludes substitution or (2) whether, substitutions having taken place, the statute of limitations is available as a defense." *Id.* at 248 n.5 (citing Annotation, *Change in Party After Statute of Limitations Has Run*, 8 A.L.R. 2d 6, 12 (1949)).

since service was not accomplished until three days after the statute ran.⁵¹

The *Martz* court concluded that the appropriate Rule 15(c) time period was simply the statute of limitations. The court reasoned as follows:

One cannot have notice that a suit has been brought against him until he hears of it. Even if dePolo were found to be an agent of Miller Brothers Company of Newark, the fact remains that he had no notice of this suit until April 10, 1963, three days after the statute of limitations had run.⁵²

The motion for leave to amend was thereby denied and summary judgment was granted to Miller Brothers Company.⁵³

The contrasting interpretation of this provision is set forth in *Ingram*. After treating the plaintiff's decedent in Illinois, Dr. *Vijay S. Kumar*, a neurosugeon, moved to New York.⁵⁴ The plaintiff commenced a medical malpractice action in the United States District Court for the Southern District of New York, by filing a summons and complaint naming Dr. *Vijaya N. Kumar* as the defendant.⁵⁵ When the plaintiff attempted to serve *Vijaya N. Kumar*, it was discovered that this doctor never treated plaintiff's decedent.⁵⁶ After this discovery, the plaintiff sought leave to amend her complaint to designate the defendant as *Vijay S. Kumar*.⁵⁷ Employing a liberal interpretation of the "within the period provided by law" language, the court defined the key issue to be whether service on the correct defendant would be timely under the Federal Rules governing service of process.⁵⁸ The

51. *Martz*, 244 F. Supp. at 248.

52. *Id.* at 254.

53. *Id.*

54. *Ingram*, 585 F.2d at 567.

55. *Id.* The error occurred because the defendant's highly unusual name, *Vijay S. Kumar*, was not listed in the New York State Medical Directory consulted by plaintiff's counsel. *Id.* at 572. Upon finding a similar name, *Vijaya N. Kumar*, the attorney believed this to be the proper spelling of defendant's name. *Id.* at 567.

56. *Id.*

57. *Id.* at 567-68.

58. *Id.* at 571. Rule 4, Federal Rules of Civil Procedure, governs service of process. Rule 4(j), defining the time limit for service, states that:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

FED. R. CIV. P. 4(j) (emphasis added).

court held that the defendant received notice "within the period provided by law" and, accordingly, that the statute of limitations did not bar the action.⁵⁹

It is submitted that the restrictive *Martz* interpretation of this provision of Rule 15(c) is logically flawed,⁶⁰ and furthermore, that the court itself realized the injustice resulting from its interpretation.⁶¹ By construing the provision to mean notice within the limitations period, the court created a situation under which a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly.⁶² For example, in *Martz*, had the plaintiff filed suit correctly naming Miller Brothers Company of Newark on the last day of the limitations period, he would have had 120 days from that date to effect service of process,⁶³ which he clearly accomplished. However, by suing the wrong defendant, the 120-day period for notice by service of process was effectively abolished by the *Martz* analysis.

Classifying the flaw raised here as a "curious but minor difficulty of interpretation," Professor (now Justice) Benjamin Kaplan, reporter for the Advisory Committee on Civil Rules, implicitly criticized the *Martz* decision.⁶⁴ Professor Kaplan acknowledged the anomaly of

59. *Ingram*, 585 F.2d at 571-72.

60. For a discussion of this logical flaw, see *infra* text accompanying notes 62-65.

61. *Martz*, 244 F. Supp. at 255. The court expressed its reluctance in reaching its decision by noting that the decision was not in harmony with the policy followed in *Williams v. Pennsylvania Ry.*, 91 F. Supp. 652 (D. Del. 1950). See *Martz*, 244 F. Supp. at 255. In *Williams*, Judge Rodney wrote:

I conclude that it is in the interest of justice that the present motion be granted. It is clear that it is becoming increasingly the policy of the law to determine the claims of litigants upon their merits and to disregard technicalities, as far as possible. The conclusion reached in this case is believed to be in harmony with that policy.

Id. (quoting *Williams*, 91 F. Supp. at 657). Further evidence of the *Martz* court's uneasiness with its holding can be seen in Judge Wright's closing remark: "The court cannot substitute its own assumptions, or notions of fair play, or reluctance to see controversies decided upon technicalities, for the clear mandate of the law." *Id.* at 256.

62. *Martz*, 244 F. Supp. at 254. The court recognized the anomaly of this result and even suggested a satisfactory interpretation, as follows:

Query whether this inconsistency in the proposed Rule 15(c) would not frequently defeat the purposes which the change was intended to serve.

Perhaps the anomalous result pointed up here could be righted if the words "and serving him with notice of the action" could be added to the proposed rule after "within the period provided by law for commencing the action against him." This would not change the theory of notice to which the rule should equitability be attuned.

Id. at 254 n.21.

63. For a discussion of the relationship between Rules 4(j) and 15(c), see *supra* text accompanying note 58.

64. See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 410 n.204 (1967).

dismissing an action, which "against the original defendant . . . would be considered timely brought despite the delayed service."⁶⁵

Contrary to *Martz*, the *Ingram* analysis is consistent with the theory and rationale of the Federal Rules generally⁶⁶ and specifically with Rule 15(c) itself.⁶⁷ Defining the "period provided by law for commencing the action" to include the time allowed for service of process is a logical construction which carries out the beneficial purpose of the 1966 amendment.⁶⁸ This interpretation prevents the injustice committed by the *Martz* analysis⁶⁹ from abrogating the concerns of the Federal Rules and is therefore desirable and necessary.⁷⁰

B. Schiavone v. Fortune: *Settling the Issue in an Unsettling Way*

In 1986, the Supreme Court of the United States interpreted the relation-back doctrine and, specifically, the Rule 15(c) time requirement, in *Schiavone v. Fortune*.⁷¹ Ronald A. Schiavone, Genaro

65. *Id.*

66. There are several Federal Rules which the *Martz* analysis violates, and conversely, which the *Ingram* analysis does not violate. Rule 1 identifies the purpose underlying the establishment of the Federal Rules as promotion of just, efficient, and economical resolution of every action. The *Ingram* analysis is better structured toward accomplishment of this goal. See *supra* text accompanying notes 54-65. For example, Rule 4(j), providing for timely service of process, is all but totally disregarded by the *Martz* analysis. In contrast, the *Ingram* analysis specifically incorporates this rule. For further discussion of this distinction, see *supra* note 58 and accompanying text.

Futhermore, the *Ingram* analysis considers Rule 15(a), which states that "leave [to amend] shall be freely given when justice so requires"; however, the *Martz* analysis virtually ignores Rule 15(a). For a discussion of the importance of reading Rule 15(c) in conjunction with Rule 15(a), see *supra* text accompanying notes 12-17.

67. *Ingram*, 585 F.2d at 571-72.

68. *Id.* at 572.

69. For a discussion of the injustice created by the *Martz* analysis, see *supra* text accompanying notes 60-65.

70. *Ingram*, 585 F.2d at 571-72.

71. 477 U.S. 21 (1986). Ronald A. Schiavone, Genaro Liguori and Joseph A. DiCarolis each filed their respective complaints against Fortune. *Id.* at 22. The petitioners will be noted herein, however, as "Schiavone" since the actions were consolidated and the pertinent facts, dates, and complaints of each litigant are the same. *Id.* at 25.

The case came to the Court on a writ of certiorari to the United States Court of Appeals for the Third Circuit. *Schiavone v. Fortune*, 750 F.2d 15 (3d Cir. 1984), *aff'd*, 477 U.S. 21 (1986). The Court granted certiorari because of "an apparent conflict among the Courts of Appeals." *Schiavone*, 477 U.S. at 22 (footnote omitted). Compare *Cooper v. United States Postal Serv.*, 740 F.2d 714, 716 (9th Cir. 1984) ("within the period provided by law for commencing the action against him" language of amended Rule 15(c) should be read literally to mean statutory limitations period, not limitations period plus reasonable time for service of process), *cert. denied*, 471 U.S. 1022 (1985); *Watson v. Unipress, Inc.*, 733 F.2d 1386, 1390 (10th Cir. 1984) (notice must be received prior to expiration of the statute of limitations; no reasonable time for service of process allowed); *Hughes v. United States*, 701 F.2d 56, 58 (7th Cir. 1982) (no reasonable time for service of process may be read into the 15(c) notice requirement) and *Trace X Chemical, Inc. v. Gulf Oil Chemical Co.*, 724 F.2d 68, 70-71 (8th Cir. 1983) (Rule 15(c) held to

Liguori and Joseph A. DiCarolus each instituted diversity actions in the United States District Court for the District of New Jersey on May 9, 1983.⁷² Each plaintiff alleged that he was libeled in a cover story entitled "The Charges Against Reagan's Labor Secretary" which appeared in the May 31, 1982 issue of *Fortune* magazine.⁷³ Each complaint named "Fortune," without embellishment, as the sole defendant.⁷⁴ "Fortune" however, is only a trademark and an internal division of Time, Incorporated (Time), a New York corporation.⁷⁵

On May 20, 1983, petitioners mailed their complaints to Time's registered agent in New Jersey.⁷⁶ The complaints were received on May 23, 1983, but the agent refused service because Time was not named as a defendant.⁷⁷ On July 18, 1983, each petitioner amended his complaint to name "Fortune, also known as Time, Incorporated," as the defendant. In addition, the body of each complaint was amended to refer to "Fortune, also known as Time, Incorporated," as a New York corporation with a specified registered New Jersey agent.⁷⁸ The amended complaints were served by certified mail on July 21, 1983.⁷⁹

The district court granted Time's motion to dismiss the amended complaints on the grounds that under New Jersey law a libel action must be commenced within one year of publication of the alleged libel.⁸⁰ New Jersey state law also provides that the "date upon which a substantial distribution occurs triggers the statute of limitations for

relate back because new defendant had received sufficient notice so as not to prejudice new defendant) *with* *Kirk v. Cronvich*, 629 F.2d 404, 408 (5th Cir. 1980) (time provision of Rule 15(c) has not been given literal construction and should include a reasonable time for service of process); *Ingram v. Kumar*, 585 F.2d 566, 571-72 (2d Cir. 1978) (under Rule 15(c), period within which party to be brought in must receive notice of action includes reasonable time allowed under Federal Rules for service of process), *cert. denied*, 440 U.S. 940 (1979) and *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403, 410 (6th Cir. 1982) (Jones, J., concurring) (reasonable time for service of process should be read into Rule 15(c) notice requirement). For a detailed discussion of Rule 15(c)'s time period requirement, see *supra* text accompanying notes 41-70.

72. *Schiavone*, 477 U.S. at 22. The district court opinion, while unreported, is referred to and discussed by both the Court of Appeals for the Third Circuit and the United States Supreme Court.

73. *Id.*

74. *Id.* at 22-23. The complaint described Fortune as "a foreign corporation having its principal offices at Time and Life Building" in New York City. *Id.* at 23.

75. *Id.* at 23. Schiavone made no claim that Fortune magazine was a distinct legal entity with the capacity to be sued. *Id.* at 23 n.2.

76. *Id.* at 23.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* The New Jersey statute states that "[e]very action at law for libel or slander shall be commenced within 1 [one] year next after the publication of the alleged libel or slander." N.J. STAT. ANN. § 2A:14-3 (West 1987).

any and all actions arising out of that publication.”⁸¹ The district court found it unnecessary, for purposes of the motion, to determine the precise date the limitations period began to run.⁸² It concluded that the amendments could not relate back to the filing date of the original complaints because it had not been shown that Time received notice of institution of the suits within the period provided by law for commencing the action against it, which period it defined as the applicable statute of limitations only.⁸³

On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court’s decision.⁸⁴ It ruled that the New Jersey statute of limitations ran “on May 19, 1983, at the latest,” because a “substantial distribution” of the May 31, 1982 issue occurred, at the latest, on May 19, 1982.⁸⁵ The court further held that the necessary Rule 15(c) time period does not include the time permitted for service of process.⁸⁶

In a six-to-three decision,⁸⁷ the Supreme Court of the United States upheld the decision of the lower courts and denied relation back of the amendment to the filing of the complaint.⁸⁸ Delivering the opinion of the Court, Justice Blackmun stated that “[t]imely filing of a complaint, and notice within the limitations period to the party named in the complaint, permits imputation of notice to a subsequently named and sufficiently related party.”⁸⁹ In contrast to the lower courts, however, the Supreme Court found that neither Fortune nor Time received notice of the filing until after the limitations period had run.⁹⁰ Therefore, it concluded, “there was no proper notice to Fortune that

81. *Schiavone*, 477 U.S. at 23.

82. *Id.*

83. *Id.*

84. *Schiavone v. Fortune*, 750 F.2d 15, 19 (3d Cir. 1984), *aff’d*, 477 U.S. 21 (1986).

85. *Id.* at 16. For purposes of determining the limitations period, the court concluded that publication occurred before May 31, despite the magazine’s cover date of May 31, 1982. Subscription copies were mailed May 12 and received by subscribers between May 13 and 19; newsstand copies went on sale May 17; and, on May 11, a press release was issued and copies of the issue in question were mailed to representatives of the press. *Schiavone*, 477 U.S. at 24 n.4.

86. *Schiavone*, 750 F.2d at 18. The court held that the language of Rule 15(c) was “clear and unequivocal” as requiring notice within the statutory period. *Id.* In that regard the court stated: “While we are sympathetic to plaintiff’s arguments, we agree with the defendant that it is not this court’s role to amend procedural rules in accordance with our own policy preferences.” *Id.*

87. *Schiavone*, 477 U.S. at 21. Justice Blackmun delivered the opinion of the Court, which Justices Brennan, Marshall, Powell, Rehnquist, and O’Connor joined. Justice Stevens filed a dissenting opinion, which Chief Justice Burger and Justice White joined.

88. *Id.* at 30-32.

89. *Id.* at 29.

90. *Id.*

could be imputed to Time.”⁹¹ The Court stated that an action is commenced by the filing of a complaint and that no complaint against Time was filed on or prior to May 19, 1983, the expiration date of the applicable statute of limitations.⁹²

The first intimation that Time had of the institution and maintenance of the three suits took place after May 19, 1983. . . . It seems to us inevitably to follow that notice to Time and the necessary knowledge did not come into being “within the period provided by law for commencing the action against” Time, as is so clearly required by Rule 15(c) This is fatal, then, to petitioners’ litigation.⁹³

The Court found that any doubt regarding the time period pertinent to Rule 15(c) in the statute of limitations was dispelled by the Advisory Committee’s 1966 note concerning Rule 15(c).⁹⁴ The note defines the phrase “within the period provided by law for commencing the action” to mean “within the applicable limitations period.”⁹⁵

Writing for the dissent, Justice Stevens referred to the majority’s decision as “an aberrational—and, let us hope, isolated—return to the ‘sporting theory of justice’ condemned by Roscoe Pound eighty years ago.”⁹⁶ Noting that the rule does not refer to the statute of limitations,⁹⁷ the dissent defined the period “as includ[ing] two components, the time for commencing the action by filing of a complaint *and* the time in which the action ‘against him’ must be implemented by the service of process.”⁹⁸

Applying this interpretation, Justice Stevens explained that as petitioners filed their complaints on May 9, 1983, some ten days before the running of the limitations period, the deadline for service of any amended complaint would be pursuant to Rule 4(j), i.e., September 6,

91. *Id.*

92. *Id.* at 30.

93. *Id.*

94. *Id.* at 31. The majority stated that although the advisory committee’s commentary did not “foreclose judicial consideration of the rule’s validity and meaning, the construction given by the committee is ‘of weight.’” *Id.* (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946)).

95. *Id.* at 30-31.

96. *Id.* at 32-33 (Stevens, J., dissenting) (quoting Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404-05 (1906)).

97. *Id.* at 37. In vigorous dissent, Justice Stevens stated: “The language in the Rule imposing the deadline for amendments that relate back does not, however, refer to the statute of limitations. Rather it describes ‘the period provided by law for commencing the action *against* him.’” *Id.* (emphasis in original).

98. *Id.* (emphasis added).

1983.⁹⁹ Therefore, since petitioners filed their amendments “on July 18, 1983—well in advance of the September 6 deadline for service of process,”—the amendment was within the period required by Rule 15(c).¹⁰⁰ Additionally, the dissent stated that it would never construe the amendment as one “changing the party” and, therefore, Rule 15(c) analysis was unnecessary.¹⁰¹ However, the dissent concluded that even under Rule 15(c) scrutiny, the amended pleading would relate back to the date of the original pleading.¹⁰²

The majority’s decision effectively vitiates the purposes of the Federal Rules of Civil Procedure in general and of Rule 15(c) in particular. The majority’s interpretation of the “period provided by law” accords with that of the district court in *Martz*.¹⁰³ Not surprisingly, the anomalous result in *Martz* that necessarily flows from such an interpretation also occurred in *Schiavone*: a misnamed defendant who receives notice of the action earlier than he would be entitled if properly named in the original complaint may successfully assert a statute of limitations defense to the action. Unfortunately, the Court’s views do not seem to be in accord with those expressed earlier by Justice Black in connection with an order adopting revised rules of the Supreme Court.¹⁰⁴ In this order, Justice Black pointedly noted that the “principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring

99. *Id.* at 33. Rule 4(j) provides:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court’s own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

FED. R. CIV. P. 4(j).

100. *Schiavone*, 477 U.S. at 34. (Stevens, J., dissenting).

101. *Id.* at 36. The dissent stated that the obvious purpose of Rule 15(c) is to protect parties not named in the original complaint from potential prejudice that may arise if they are later brought in by amendment. *Id.* at 35. A risk of prejudice does exist if the identification of the defendant is so inaccurate that the defendant would not realize upon reading the complaint that he was the party being sued. *Id.* at 36. Justice Stevens argued that the misdescription of the defendant in *Schiavone* is not of the type that Rule 15(c) was meant to address: “By any standard of fair notice, the difference between the description of the publisher of *Fortune* in the original complaints and the description of the publisher of *Fortune* in the amended complaints is no more significant than a misspelling . . .” *Id.*

102. *Id.* at 37.

103. *Martz v. Miller Bros.*, 244 F. Supp. 246 (D. Del. 1965). For a discussion and analysis of the *Martz* decision, see *supra* text accompanying notes 44-70.

104. *Schiavone*, 477 U.S. at 27 (citing Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 946 (1954)).

their problems before the courts."¹⁰⁵ Moreover, the *Schiavone* Court's interpretation is clearly not in accord with Rule 8(f) in that the construction of *Schiavone*'s pleading cannot, in any light, be seen as accomplishing substantial justice.¹⁰⁶ Nor is this interpretation in line with prior Supreme Court jurisprudence, which properly announced that the spirit and inclination of the rules favor adjudication on the merits,¹⁰⁷ and that such decisions should not be avoided on the basis of mere technicalities.¹⁰⁸

The Court in *Schiavone* stated that there was no proper notice to Fortune that could be imputed to Time since neither received notice within the statutory period.¹⁰⁹ However, as noted by the dissent, serv-

105. *Id.* (citing *Order Adopting Revised Rules*, 346 U.S. at 946). Justice Black further stated that he feared judicial statistics would show a "large number of meritorious cases lost due to inadvertent failure of lawyers to conform to procedural prescriptions having little if any relevancy to substantial justice." *Order Adopting Revised Rules*, 346 U.S. at 946.

106. The elimination of technicalities acting as barriers to disposition of a case on the merits is underscored by Rule 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice." FED. R. CIV. P. 8(f). See generally FRIEDENTHAL, *supra* note 5, at 252-54.

107. *Schiavone*, 477 U.S. at 27 (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits")) (emphasis added).

108. *Id.* (citing *Foman v. Davis*, 371 U.S. 178, 181 (1962)). In *Foman*, the Court wisely stated that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman*, 371 U.S. at 181. *Schiavone* involved a "misstep" or "technicality" and, therefore, the *Schiavone* decision represents a rejection by the present Court of the sound views expressed in *Conley* and *Foman*.

109. *Schiavone*, 477 U.S. at 29. The Court's analysis apparently ignores the existence of Rule 4(j), which provides that a complaint need not give notice within the statutory period to maintain an action. Rule 4(j) clearly provides for notice within 120 days of the filing of the complaint even if this period extends past the applicable statute of limitations. FED. R. CIV. P. 4(j).

Moreover, the majority cites two cases which fail to lend support to its position in *Schiavone*. In *Norton v. International Harvester Co.*, 627 F.2d 18 (7th Cir. 1980), the plaintiff was the widow of a truck driver who was fatally injured on June 5, 1973. International Harvester Company manufactured the truck, while TRW manufactured the levershaft of the severed steering gear mechanism, which was the alleged cause of the decedent's injuries. *Id.* On December 6, 1975, the plaintiff brought an action against International Harvester, approximately six months prior to the running of the three-year statute of limitations, which occurred on June 5, 1976. *Id.* at 19. On March 21, 1978, TRW was brought in by International Harvester as a third-party defendant. *Id.* On September 25, 1978, Norton sought to amend her complaint and name TRW as a direct defendant. *Id.* at 19-20. The Seventh Circuit reversed the district court's grant of this motion. *Id.* at 23. Since the plaintiff filed her suit approximately 180 days before the running of the statute, whether the Rule 4(j) 120-day period was interpreted as included in the Rule 15(c) time requirement was irrelevant since that period expired within the three-year statute of limitations. Therefore, *Norton* cannot be said to support the proposition that Rule 15(c) absolutely requires that notice come within the statutory period. It may support only the denial to amend the complaint for cases based on facts similar to its own, where the 120-day period provided by Rule 4(j) will expire within the limitations period. *Norton* sheds no light or interpretation of the time requirement in any case, such as *Schiavone*, where the complaint is filed within 120 days of

ice of the complaints naming Time was accomplished within the 120 day period provided by Rule 4(j) and, hence, notice was clearly proper.¹¹⁰ The Court also stated that "so far as Time is concerned, no complaint against it was filed on or prior to May 19, 1983."¹¹¹ But, a complaint against Time itself *did not* have to be filed within the statute of limitations if an original complaint which, when amended to substitute Time as a defendant, satisfied the requirements set forth in amended Rule 15(c).¹¹² Schiavone *did* file such a complaint on May 9, 1983.¹¹³ If a complaint against a particular defendant must be filed within the limitations period to survive Rule 15(c) scrutiny, as the Court seems to suggest, there is no need for the relation-back doctrine at all where the changing of a party is involved.¹¹⁴

The Court attempted to bolster its analysis with the Advisory Committee's reference to the "applicable limitations period,"¹¹⁵ but ignored the Committee reporter's contemporaneous understanding.¹¹⁶ Criticizing the interpretation with which the Supreme Court aligns itself,¹¹⁷ Professor Kaplan characterizes the problem as a "curious but minor difficulty of interpretation . . . over the language of the rule referring to the limitations period."¹¹⁸ If, as the Court recognizes, the

the expiration of the applicable statutory period.

In *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99 (1st Cir. 1979), the court never reached the issue of the Rule 15(c) time requirement, but instead based its decision on plaintiff's failure to satisfy the 15(c)(2) knowledge requirement. *Id.* at 103. In this regard, the court noted: "[T]he amended complaint would still not relate back because there is no evidence in the record that appellees 'knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against [them].'" *Id.* (quoting *FED. R. CIV. P. 15(c)*).

110. *Schiavone*, 477 U.S. at 33 (Stevens, J., dissenting). Justice Stevens properly defined the deadline for amendments that relate back as including "two components, the time for commencing the action by the filing of a complaint and the time in which the action 'against him' must be implemented by the service of process." *Id.* at 37. This interpretation is consistent with the interpretation suggested by this Article. See *supra* text accompanying notes 41-70.

111. *Schiavone*, 477 U.S. at 30.

112. See *id.* at 38 (Stevens, J., dissenting). Indeed, if the party sought to be brought in by an amendment must be named in the original or an amended complaint prior to the running of the statute, the whole purpose of Rule 15(c) becomes meaningless. There is clearly no need for an amendment naming a particular party within the statutory period to "relate back" in order to validly include that party in the lawsuit. *Id.*

113. *Id.* at 22-23.

114. For a discussion of this issue, see *supra* text accompanying note 112.

115. See *Schiavone*, 477 U.S. at 37 n.4; see also Kaplan, *supra* note 64.

116. For a discussion of this issue, see *supra* text accompanying notes 64-65.

117. The reference here is to the decision rendered in *Martz v. Miller Bros.*, 244 F. Supp. 246 (D. Del. 1965). For a discussion of the *Martz* decision, see *supra* text accompanying notes 44-70 and 103.

118. Kaplan, *supra* note 64, at 410 n.204.

Committee's construction is "of weight,"¹¹⁹ it would seem that an insider's explanation of the Committee's reasoning and basis for its proposals would carry greater weight than a reading of a cold record by those outside the Committee.

The Court recognized the arbitrariness of its decision,¹²⁰ but rationalized that it was imposed by the legislature and that arbitrariness is not uncommon in the law. The majority also asserted that it did not have a choice between a liberal and technical interpretation of the rule.¹²¹ These are simply not accurate or realistic statements. As the final arbiter of disputes in the American judiciary, if it is not the Supreme Court's duty to set forth interpretations of particular rules of law that promote the greatest equity, then where must one turn if one seeks justice? It is troubling that the majority, as well as other courts,¹²² have ignored their duty to *interpret* with an eye toward justice under the guise that they may not *amend* procedural rules in accord with their own preferences.¹²³

The following statement of the Court is also not well taken: "The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says."¹²⁴ If the language which sets forth Rule 15(c)'s time requirement is clear, "plain language," why did the Seventh, Eighth, Ninth and Tenth Circuit Courts of Appeals interpret the language to refer to the statute of limitations period, while the Second, Fifth and Sixth Circuit Courts of Appeals interpreted the same "plain language" to mean the limitations period plus the time allowable for service of process under Rule 4(j)?¹²⁵ Furthermore, why do three Supreme Court

119. See *Schiavone*, 477 U.S. at 31 (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946), as follows: "[t]he fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. But in ascertaining their meaning the construction given to them by the Committee is of weight").

120. See *id.* Oddly, the Court chose to ignore Justice Kaplan's comments, when the very case it cited relied upon an explanation of Rule 4(f) by an authorized spokesman for the Advisory Committee. *Id.*

121. *Id.* at 30.

122. It is not coincidental that several of the courts holding as the Supreme Court did in *Schiavone* with respect to the Rule 15(c) time requirement have done so almost apologetically. See, e.g., *Schiavone*, 750 F.2d at 18 ("Plaintiffs' argument, as a policy matter, is quite persuasive While we are sympathetic to plaintiffs' arguments, we agree . . . that it is not this court's role to amend procedural rules in accordance with our own policy preferences."). The district court deciding *Schiavone* granted the motion to dismiss "with great reluctance," noting that any dismissal of a claim based upon the statute of limitations "by its very nature is arbitrary." *Schiavone*, 477 U.S. at 24 (citation omitted); see also *supra* text accompanying note 61.

123. See *supra* text accompanying note 122.

124. *Schiavone*, 477 U.S. at 30.

125. See *supra* note 71.

Justices come to a different conclusion than the other six when interpreting the same "plain language"? The simple answer to these questions is that the disputed language is anything but plain, much less clear. If the Court's characterization of this language were accurate, *Schiavone* would never have been decided by the Supreme Court: the conflicting and inconsistent interpretation of that language is precisely what led to the grant of certiorari.¹²⁶

As stated by the dissent, the Court's willingness to perpetrate, rather than alleviate, a perceived arbitrariness is incomprehensible, especially when "the decision is the product of an unnecessary and unjust construction of the language of the Rule" and "is demonstrably at odds with the language, purpose, and history of the Rule."¹²⁷

III. THE AFTERMATH OF *SCHIAVONE*

The widespread impact of *Schiavone* is evidenced by its citation in every United States Court of Appeals in the short time that has elapsed since the Supreme Court's decision was rendered.¹²⁸ The cases which have cited *Schiavone* can be divided into three distinct categories: (a) those which follow *Schiavone*, either with or without reservation or concern; (b) those in which either the majority or dissent go to great lengths to distinguish *Schiavone* in an effort to escape the fore-

126. *Id.*

127. *Schiavone*, 477 U.S. at 40 (Stevens, J., dissenting). Justice Stevens added:

That the majority's reading of the "plain language" leads to bizarre results is not altogether surprising. For the majority, relying so heavily on what it views as the clarity of the language before it, ignores the mission and history of Rule 15(c).

The principal purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way. That purpose is defeated—and the Rule becomes largely superfluous—if it is construed to require the correction to be made before the statute has run. Moreover, the specific liberalizing purpose of the 1966 amendment to the Rule is frustrated if the added language is construed to cut back on the number of cases in which relation back is permitted.

. . . Ironically, it is the language added by the amendment in 1966 to broaden the category of harmless pleading errors which the Court construes today to narrow that category.

Id. at 38-39.

128. *Rys v. United States Postal Serv.*, 886 F.2d 443, 445 (1st Cir. 1989); *Bornholdt v. Brady*, 869 F.2d 57, 69 (2d Cir. 1989); *Daly v. Department of the Army*, 860 F.2d 592, 594 (3d Cir. 1988); *Gardner v. Gartman*, 880 F.2d 797, 798 (4th Cir. 1989); *Bell v. Veterans Admin. Hosp.*, 826 F.2d 357, 359-60 (5th Cir. 1987); *Berndt v. Tennessee*, 796 F.2d 879, 884 (6th Cir. 1986); *Williams v. United States Postal Serv.*, 873 F.2d 1069, 1073 (7th Cir. 1989); *Warren v. Department of the Army*, 867 F.2d 1156, 1158 (8th Cir. 1989); *Johnston v. Horne*, 875 F.2d 1415, 1419 (9th Cir. 1989); *Slade v. United States Postal Serv.*, 875 F.2d 814, 814 (10th Cir. 1989); *Bates v. Tennessee Valley Auth.*, 851 F.2d 1366, 1367 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 3157 (1989); *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1053 (D.C. Cir. 1988).

gone inequity which would result from its application; and (c) those which rely on *Schiavone* to ease the impact of arbitrary or unjust results arising from interpretation of procedural rules, even though the majority of these cases do not involve Rule 15(c).

A. Cases Following Schiavone Either With or Without Reservation

The cases contained in this subdivision can be further divided into two categories: those which expressly and simply follow *Schiavone* and those which follow *Schiavone* with reservation or concern. It is to be expected that cases applying *Schiavone* will continue to abound. As of this writing, cases falling into this category can be found in almost every judicial circuit. After all, *Schiavone* is a United States Supreme Court decision which is binding on all federal courts and is persuasive authority in state proceedings where the local procedural rule is similar to Rule 15(c). Accordingly, in order for a court to avoid the harshness of the Supreme Court's decision in *Schiavone*, the court must distinguish the case before it from *Schiavone*. Since *Schiavone* has been extensively analyzed and discussed, further discussion of all the cases simply following *Schiavone* is unnecessary.¹²⁹

However, *Williams v. Army and Air Force Exchange Service*¹³⁰ does merit a brief discussion as an example of a case in which a court follows *Schiavone* with reservation. *Williams* involved the appeal by a government employee of dismissal of her Title VII action for suing the wrong defendant.¹³¹ Williams sued the agency which employed her—the Army and Air Force Exchange Service—instead of suing the agency head as required by Title VII.¹³² She then failed to name or serve an appropriate substitute government defendant within the thirty-day statutory period.¹³³ Subsequent to the expiration of the short statutory period, but prior to the time allowable for service of process, Williams attempted to amend her complaint to properly name Secretary of Defense Caspar Weinberger as the defendant, relying on the relation-back provision of Rule 15(c).¹³⁴

Affirming the lower court's grant of summary judgment to the defendant, the Third Circuit held that the "question is squarely an-

129. See *Williams v. United States Postal Serv.*, 873 F.2d 1069, 1073 (7th Cir. 1989); *Johnston v. Horne*, 875 F.2d 1415, 1419 (9th Cir. 1989); *Daly v. United States Dep't of the Army*, 860 F.2d 592, 594 (3d Cir. 1988); *Bell v. Veterans Admin. Hosp.*, 826 F.2d 357, 360 (5th Cir. 1987).

130. 830 F.2d 27 (3d Cir. 1987).

131. *Id.* at 28.

132. *Id.*; see also 42 U.S.C. § 2000e-16(c) (1982).

133. *Williams*, 830 F.2d at 28.

134. *Id.* at 29.

swered by *Schiavone*.¹³⁵ However, the court concluded its analysis of the issue by expressing its apprehension:

It is with some discomfiture that we apply *Schiavone* to this case, for the current Rule 15(c) was adopted to avoid such harsh results when the incorrect government defendant is named. Indeed, the 1966 amendment was part of a package of reforms that "collectively have the effect of guaranteeing plaintiff a hearing on the merits . . . without risk of being defeated on a technical pleading error traceable to confusion created by the size and internal complexities of the national government's structure." Moreover, the results of *Schiavone* are particularly unfortunate in this case which involves such a short statute of limitations (30 days) and an untutored litigant. But amelioration of these harsh results is for the Rules Committee, not for this Court.¹³⁶

B. Cases Distinguishing *Schiavone*

The cases in this subdivision are likewise capable of division into two categories: those which properly distinguish *Schiavone*, and those in which either the majority or dissent engage in extraordinary measures to escape application of *Schiavone*.

1. Properly Distinguishing *Schiavone*

Several cases have properly recognized that *Schiavone* does not affect existing precedent regarding what constitutes proper notice or service of process under Rule 15(c). For example, in *Barkins v. International Inns, Inc.*,¹³⁷ the Fifth Circuit rejected the defendant's argument that *Schiavone* overruled a line of that circuit's cases which held that notice to counsel constitutes notice to a client for Rule 15(c) purposes.¹³⁸ The defendant's argument apparently was based on the fact

135. *Id.*

136. *Id.* at 30 (quoting WRIGHT, *supra* note 5, at 529 n.51; citing FED. R. Crv. P. 15(c) advisory committee's note).

137. 825 F.2d 905 (5th Cir. 1987).

138. *Id.* at 907 (citing *Hendrix v. Memorial Hosp.*, 776 F.2d 1255, 1258 (5th Cir. 1985) (new defendant had same mailing address and attorneys as original defendant); *Kirk v. Cronvich*, 629 F.2d 404, 407 (5th Cir. 1980) (same attorney who represented original defendant also represented new defendant, the sheriff's office, throughout the litigation); *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135, 1147 (5th Cir. 1970) (new defendant's attorney filed answer to the original complaint; hence, defendant must have received adequate notice of the institution of the suit)); *see also* *Ramirez v. Burr*, 607 F. Supp. 170, 174 (S.D. Tex. 1984) (service to director and to board provided notice to individual board members, especially since all were represented by same counsel); *Morrison v. Lefevre*, 592 F. Supp. 1052, 1057-58 (S.D. N.Y. 1984) (prison officials added to suit had notice through attorney shared with prison officials named in original complaint).

that each of these cases also interpreted the Rule 15(c) time period to be the statute of limitations plus the time allowable for service of process, contrary to *Schiavone*. In affirming the district court's order permitting the plaintiffs to amend their complaint in order to substitute the proper defendant, the court concluded that "*Schiavone* did not affect this Circuit's precedents concerning what constitutes notice under Rule 15(c). Since International Inns received notice through counsel *before* the ninety day limitations period expired, *Schiavone* does not apply."¹³⁹

Similarly, in *Slade v. United States Postal Service*,¹⁴⁰ the Tenth Circuit reversed the district court's *Schiavone*-based dismissal of the plaintiff's complaint for failure to sue the proper party within the statute of limitations, where the key issue was effective service of process in actions brought against an agency or officer of the United States.¹⁴¹ In *Slade*, the plaintiff sent a copy of the complaint by certified mail to the United States Attorney for the Northern District of Oklahoma and to the Attorney General of the United States on the last day of the limitations period.¹⁴² Neither received service until several days after the statute of limitations had run.¹⁴³ The plaintiff did not serve process on Mr. Preston R. Tisch, the Postmaster General of the United States at that time, who was the only proper party defendant to the action.¹⁴⁴

Citing *Schiavone*, the court's analysis began with what has become a rather familiar summary of the four requirements which must be satisfied in order for an amendment changing a party against whom a claim is asserted to relate back:

- (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.¹⁴⁵

The court went on to recognize that "Rule 15(c) provides that effective service on *either* the United States Attorney or the Attorney Gen-

139. *Barkins*, 825 F.2d at 907 (emphasis in original).

140. 875 F.2d 814 (10th Cir. 1989).

141. *Id.* at 815-16.

142. *Id.* at 814.

143. *Id.* at 814-15.

144. *Id.* at 815 (citing *Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1478 (10th Cir. 1988)).

145. *Id.* (quoting *Schiavone*, 477 U.S. at 29).

eral within the limitations period satisfies the final three requirements of the *Schiavone* test.”¹⁴⁶ Additionally, it was noted that Rule 15(c) expressly states that “delivery or mailing” is permissible and effective.¹⁴⁷ Plaintiff’s “service on the Attorney General was complete upon mailing and therefore accomplished within the limitations period.”¹⁴⁸ Concluding its analysis, the court stated that “[a]ccordingly, by virtue of service on the Attorney General within the limitations period, notice of Mr. Slade’s claim is imputed to the Postmaster General, and all of the requirements of the *Schiavone* test are met.”¹⁴⁹

The need for the proper party to have notice of the action within the limitations period simply reinforces the basic criticism which pervades this entire Article: If one must give notice to the proper party within the statute of limitations, there is no need to “relate back” to anything. In essence, the law permits one to take advantage of the relation-back doctrine once it is shown that the party has no need for it while those who attempt to use it for its intended purpose are denied access to its use and benefits. The circularity of this reasoning, while readily apparent, will continue to create and fortify inequity as long as *Schiavone* remains in effect.

2. Engaging in Extraordinary Measures

Perhaps the most interesting class of cases citing *Schiavone* are those where the facts clearly dictate application of *Schiavone* but a majority or dissent “distinguishes” the case to avoid the resulting inequity. A good example of this can be found in the Third Circuit’s majority opinion in *Dandrea v. Malsbary Manufacturing Co.*¹⁵⁰

In *Dandrea*, the plaintiff filed a complaint alleging violations of the Age Discrimination and Employment Act and the Fair Labor Standards Act against Malsbary Manufacturing Company five days prior

146. *Id.* (emphasis in original) (citing *Paulk v. Department of Air Force*, 830 F.2d 79, 82 (7th Cir. 1987); *Edwards v. United States*, 755 F.2d 1155, 1158 (5th Cir. 1985)).

147. *Id.* The court noted that Rule 15(c)’s express statement that “delivering or mailing” is permissible

most likely was designed to be consistent with the provisions of FED. R. CIV. P. 4(d)(4) and 4(d)(5), which specify that service is made on the United States or an officer or agency thereof by delivery of the summons and complaint to the United States Attorney, and by sending the same by certified mail to the Attorney General and to the officer or agency being sued.

Slade, 875 F.2d at 815.

148. *Slade*, 875 F.2d at 816; see also FED. R. CIV. P. 5(b) (stating that service by mail is complete upon mailing).

149. *Slade*, 875 F.2d at 816.

150. 839 F.2d 163 (3d Cir. 1988).

to expiration of the limitations period.¹⁵¹ Service occurred within the Rule 4(j) 120-day limit.¹⁵² However, after her employment discharge, but before the plaintiff instituted her action, Malsbary officially changed its name to Koppenhafer Corporation.¹⁵³ Accordingly, no corporation or legal entity known as "Malsbary Manufacturing Company" existed at the time that the plaintiff began her action.¹⁵⁴ When the plaintiff sought to amend her complaint to name Koppenhafer as the proper defendant, the request was denied and the case was dismissed.¹⁵⁵

On appeal, the Third Circuit defined the essence of the dispute to be "whether Dandrea, by amending her complaint, would be 'changing the party' against whom her claim is asserted."¹⁵⁶ In reaching the conclusion that she would not, the court characterized plaintiff's proposal as one to "amend a complaint against a single party to include that same party's current name."¹⁵⁷ The court distinguished *Schiavone* on the grounds that:

Dandrea sued not a trademark but an existing corporation. Thus, unlike *Schiavone*, this is not a case where the plaintiff has named as a party an entity without the capacity to sue or be sued. Nor do we have before us a case where a plaintiff has sued an entity whose former name is now being used by another corporation, creating uncertainty as to whether the proper party is before the Court; Malsbary itself asserts that there is no longer *any* entity called "Malsbary Manufacturing Company." This is not a case, finally, where the plaintiff sought to sue an entity completely different from, although perhaps affiliated with, the one named in the complaint. Malsbary is not an internal division, a partner, a parent, or a subsidiary of Koppenhafer Corporation. It is the same corporation Dandrea has sued the correct entity, which still

151. *Id.* at 165.

152. *Id.*

153. *Id.* at 164. The court stated:

On October 4, 1985, . . . Malsbary, a wholly owned subsidiary of Carlisle Corporation, changed its name to Koppenhafer Corporation. Malsbary's application to change its name was granted by the State of Delaware on October 4, 1985, and an amended certificate of authority was issued by the Commonwealth of Pennsylvania on October 7, 1985, authorizing Malsbary to do business in Pennsylvania under the name of Koppenhafer Corporation. Also on October 4, 1985, Malsbary sold its assets to Mintex International Corporation . . . [which] continued to operate the Uniontown, Pennsylvania facility where Dandrea worked.

Id. at 164-65.

154. *Id.* at 165.

155. *Id.* at 165-66.

156. *Id.* at 166.

157. *Id.*

exists and has the capacity to be sued, using its former name, one not currently used by any other entity; she seeks to amend the complaint not for the purpose of changing, substituting, or adding a party, but solely for the purpose of including the same party's correct name. We decline to extend *Schiavone*'s holding to preclude Dandrea's amendment.¹⁵⁸

Particularly curious in the majority's analysis is its assertion, on the one hand, that this is not a case where the plaintiff has named an entity without the capacity to sue or be sued as a party, while on the other hand properly recognizing that there is "no longer *any* entity called Malsbary Manufacturing Company." If the latter statement is true, and it is, then Dandrea's amendment of the complaint to eliminate a non-existent entity and insert an active, viable corporation is quite clearly one that changes a party.

The majority's characterization of the Dandrea amendment is an unreasonable and unprecedented stretch in an effort to avoid application of *Schiavone*. *Dandrea* is clearly not factually distinguishable from *Schiavone* in any legally significant way.¹⁵⁹ "In both, the plaintiff improperly named [a non-existent legal entity] as the defendant in its complaint, attempted service and then sought to amend the complaint after the statute of limitations had run but within the 120 days provided for service by Federal Rule of Civil Procedure 4(j)."¹⁶⁰ In refusing to apply *Schiavone*,

the majority fails to appreciate the clear lesson of *Schiavone*, i.e., that even a simple error in designating the party defendant in a pleading requires satisfaction of Rule 15(c) if an amended pleading correcting the misnomer is to relate back to the date the original pleading was filed By holding inapposite, the majority avoids the need to consider *Schiavone*.¹⁶¹

While *Dandrea* involves the refusal of a court to apply *Schiavone*, the dissent in *Gonzales v. Secretary of Air Force*¹⁶² reflects a refusal to

158. *Id.* at 167-68. 2

159. The author agrees with Judge Hutchinson's statement in his dissent that:

I believe the plaintiff's mistake in *Schiavone* is indistinguishable from the mistake made in this case. Both amendments involved misdescription of a defendant; both should satisfy Rule 15(c). . . . In the instant case, neither Malsbary nor Koppenhafer was afforded notice of the suit within the three year statute of limitations. . . . Since there was notice to neither Malsbary nor Koppenhafer within the limitations period, there is nothing to which the amended complaint could relate back.

Id. at 169-70 (Hutchinson, J., dissenting).

160. *Id.* at 168.

161. *Id.* at 168-69.

162. 824 F.2d 392 (5th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988).

accept the actual holding of *Schiavone*. In *Gonzales*, the plaintiff filed suit pursuant to Title VII of the Civil Rights Act of 1964, naming the Department of the Air Force as the sole defendant within the statutory filing period.¹⁶³ Process was properly served on the Department after expiration of the statute of limitations, but well within the time allowable for service of process under Rule 4(j).¹⁶⁴

The Department moved to dismiss the plaintiff's complaint because he failed to name the Secretary, who was the proper defendant.¹⁶⁵ Based on Fifth Circuit precedent that liberally interpreted Rule 15(c), the plaintiff requested and was granted leave to amend his complaint to add the Secretary as a defendant.¹⁶⁶ However, upon the Supreme Court's rendering of its decision in *Schiavone*, the district court granted the defendants' motion to reconsider and, based on *Schiavone*, dismissed the plaintiff's complaint.¹⁶⁷ When the case was appealed to the Fifth Circuit, it affirmed the district court's dismissal of the plaintiff's complaint.¹⁶⁸ Finding that the majority's characterization of Rule 15(c) created "traps to frustrate a citizen in his quest to vindicate his civil right [and] is contrary to . . . the aspirations of the drafters of the Federal Rules of Civil Procedure," Judge Brown vigorously dissented.¹⁶⁹

Interestingly, Judge Brown distinguished *Schiavone* from *Gonzales* by making a distinction between the *commencement* and the *filing* of a lawsuit. The New Jersey statute of limitations governing *Schiavone* required that a libel action be *commenced* within one year after the publication of the alleged libel.¹⁷⁰ "Under New Jersey law, both the issuance of process and a bona fide attempt to serve process are essen-

163. *Id.* at 393. Section 2000e-16(c) of the Civil Rights Act of 1964 provides:

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. § 2000e-16(c) (1982).

164. *Gonzales*, 824 F.2d at 394.

165. *Id.*

166. *Id.* (citing *Hendrix v. Memorial Hosp.*, 776 F.2d 1255 (5th Cir. 1985); *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980)).

167. *Gonzales v. Secretary of Air Force*, 638 F. Supp. 1323 (N.D. Tex. 1986), *aff'd*, 824 F.2d 392 (5th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988).

168. *Gonzales*, 824 F.2d at 396.

169. *Id.* (Brown, J., dissenting).

170. N.J. STAT. ANN. § 2A:14-3 (West 1987) (emphasis added).

tial to the institution of a suit.”¹⁷¹ In *Schiavone*, the plaintiff’s counsel did not attempt to serve the defendants until shortly after the limitations period had expired.¹⁷² Therefore, Judge Brown reasoned that *Schiavone* did not “commence” his lawsuit until after the limitations period had expired.¹⁷³ “Consequently, there was no party to relate back to. This is in sharp contrast to *Gonzales*’ suit: the federal statute requires only that a suit be *filed* within a thirty day period.”¹⁷⁴ Upon reaching this point in his analysis, Judge Brown concluded that the Secretary received notice eighteen days after the suit was filed, well within the 120 days allowed by Rule 4(j).¹⁷⁵ He concluded, therefore, that relation back should have been permitted.¹⁷⁶

What is particularly interesting about this argument is that it was never raised in *Schiavone*, nor was it a basis for the Court’s opinion, as Judge Brown infers. While the argument may have been successful if advanced below, it simply was not a part of the case and had nothing to do with the decision in *Schiavone*. In fact, in interpreting Rule 15(c), not the New Jersey statute, the *Schiavone* majority reasoned that “[u]nder Rule 15(c), the emphasis is upon ‘the period provided by law for commencing the action against’ the defendant. *An action is commenced by the filing of a complaint . . .*”¹⁷⁷ It may seem extraordinary that a judge sitting in the Fifth Circuit would advance a technical, procedural argument based on New Jersey statutory and case law to somehow distinguish *Schiavone* from *Gonzales*. However, when one realizes the gross inequities that result from applying *Schiavone*, Judge Brown’s effort is understandable.

Judge Brown’s “strongest disagreement with the majority’s opinion is their reliance on *Schiavone* and Rule 15(c) while utterly ignoring Rule 4(j).”¹⁷⁸ However, *Schiavone* mandates that Rule 4(j) be completely ignored and vitiated in relation-back cases. By stating that “[t]he fourth requirement wraps up the above-mentioned three as a neat package, since the other standards were met within the time period set out in . . . Rule 4(j),” the dissent in *Gonzales* completely con-

171. *Gonzales*, 824 F.2d at 397-98 (Brown, J., dissenting) (citing *Bittles v. West Ridgelawn Cemetary*, 108 N.J. Eq. 357, 155 A. 130 (N.J. Ch. 1931)). Under New Jersey law, the stated reasoning behind the need for a good faith attempt at service of process is that the statute of limitations continues to run after the complaint is filed. *Id.* at 398 (citing *Zaccardi v. Becker*, 88 N.J. 245, 440 A.2d 1329 (1982)).

172. *See Schiavone*, 477 U.S. at 30.

173. *Gonzales*, 824 F.2d at 398 (Brown, J., dissenting).

174. *Id.*

175. *Id.*

176. *Id.* at 399.

177. *Schiavone*, 477 U.S. at 30 (emphasis added).

178. *Gonzales*, 824 F.2d at 397 (Brown, J., dissenting).

tradicts and violates the holding in *Schiavone*.¹⁷⁹ In *Schiavone*, the court expressly held that the “prescribed limitations period” referred to in the fourth requirement is the statute of limitations, and thereby simply refused to include the Rule 4(j) time period within this definition.¹⁸⁰

The closing comments of the dissent succinctly summarize the obvious and most compelling criticism of *Schiavone*:

Without reading Rule 15(c) to operate after the expiration of the applicable statute of limitations, it would become a dead letter. “The principal purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice [the real adversary] in any way.” That purpose is defeated—and the statute becomes largely superfluous—if it is construed to require the correction to be made before the statute has run.¹⁸¹

C. *Cases Relying on Schiavone to Ease the Impact of Arbitrary or Unjust Results Arising From Interpretation of Procedural Rules*

Unfortunately, it appears that *Schiavone* has been and will probably continue to function as a precedential base to ease the consciences of judges and justices whose interpretation of procedural rules leads to harsh or unjust results. For example, recall the following language in *Schiavone*:

[W]e do not have before us a choice between a “liberal” approach toward [the Rule], on the one hand, and a “technical” interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.¹⁸²

This language has been cited to justify an apparently unjust result.¹⁸³ Categorizing the Rule 15(c) time period as “plain language” defies logic. Accordingly, no litigant or court should cite *Schiavone* for this proposition, regardless of the particular procedural rule at issue.

179. *Id.* at 399.

180. *Schiavone*, 477 U.S. at 30-31.

181. *Gonzales*, 824 F.2d at 399 (Brown, J., dissenting) (quoting *Schiavone*, 477 U.S. at 38 (Stevens, J., dissenting)).

182. *Schiavone*, 477 U.S. at 30.

183. See, e.g., *United States v. John Doe, Inc. I*, 481 U.S. 102, 109 (1987) (quoting *Schiavone*, 477 U.S. at 30) (interpreting Rule 6(e) of the Federal Rules of Criminal Procedure).

Additionally, *Schiavone* has been cited for the proposition that arbitrary results or harsh construction of procedural rules are "imposed by the legislature and not by the judicial process."¹⁸⁴ It quite disturbingly appears that legislatively imposed rules are entitled to a somewhat greater level of tolerability. Again, citations to *Schiavone* to support this proposition are suspect. One must seriously question how the Court can possibly blame the harsh and arbitrary result reached in *Schiavone* on the legislature. Rule 15(c) was clearly susceptible to the two very distinct interpretations which had been set forth in the circuits.¹⁸⁵ The Supreme Court was free to adopt either of these interpretations as the proper meaning of the time period provided in Rule 15(c). In fact, Rule 8(f) is the only guidance provided by the legislature, guidance which mandates a conclusion opposite to the one reached by the Court. *Schiavone* cannot possibly be seen as consistent with Rule 8(f), which instructs that "[a]ll pleadings shall be so construed as to do substantial justice."¹⁸⁶ More importantly, *Schiavone* may well be at odds with Rule 1, which states that "[t]hese rules . . . shall be construed to secure the *just*, speedy, and inexpensive determination of every action."¹⁸⁷ While relation-back cases will certainly be speedy and inexpensive, the requirement that justice be served cannot possibly be satisfied. Responsibility for the harsh and arbitrary construction of Rule 15(c) rests squarely with the Supreme Court, not with the legislature. Any citation to *Schiavone* for the contrary proposition is not only misleading, but inaccurate.

IV. PROPOSAL FOR REFORM

The *Schiavone* decision has all but erased the relation-back doctrine as it pertains to amendments regarding either a party against whom a claim has been asserted, or the time allowable for service of process in cases involving that issue. There are two avenues by which these valuable rules and concepts can be restored to our scheme of federal procedure.

A. *Reconsideration by the Court*

The first avenue would require the Court to exercise its right to reconsider and overrule its own precedent.¹⁸⁸ Although the Court has

184. See, e.g., *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405, 2409 (1988) (quoting *Schiavone*, 477 U.S. at 31) (interpreting Rule 3(c) of the Federal Rules of Appellate Procedure); *Williams v. United States Postal Serv.*, 873 F.2d 1069, 1074 (7th Cir. 1989) (quoting *Schiavone*, 477 U.S. at 31) (interpreting Rule 15(c) of the Federal Rules of Civil Procedure).

185. See *supra* text accompanying notes 41-70.

186. FED. R. CIV. P. 8(f).

187. *Id.* 1 (emphasis added).

188. See, e.g., *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535

recently displayed an inclination to do so in heated areas of constitutional law,¹⁸⁹ the likelihood of *Schiavone* being overruled or reconsidered is minimal. In fact, the comparative makeup of the Court deciding *Schiavone* and the present Court suggests that it would not be overruled.¹⁹⁰ However, one can only hope that the next time the Court is faced with adjudicating a Rule 15(c) matter, it will invoke this right and set forth an interpretation which restores the intended meaning and purpose to the relation-back doctrine.

B. Action by the Rules Committee

The second and more likely avenue to restore the relation-back doctrine would require action by the Rules Committee. It is this author's suggestion that the applicable portion of Rule 15(c) be amended to read as follows:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party the statute of limitations plus the time allowable for service of process, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(1983) (only Supreme Court may overrule one of its own precedents); *United States v. Johnson*, 457 U.S. 537, 551 (1982) (Supreme Court may explicitly overrule one of its own precedents).

189. The reference, of course, is to the Court's recent decision in *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989), and to its decision to grant certiorari in three abortion cases which may result in the complete overruling of *Roe v. Wade*, 410 U.S. 113 (1973). See *Slaby v. Ohio*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted sub nom. Ohio v. Akron Center for Reproductive Health*, 109 S. Ct. 3239 (1989); *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), *juris. postponed*, 109 S. Ct. 3239 (1989); *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988), *cert. granted*, 109 S. Ct. 3240 (1989).

190. The majority in *Schiavone* consisted of Justices Brennan, Marshall, Blackmun, Powell, Rehnquist, and O'Connor while Chief Justice Burger and Justices White and Stevens dissented. Since the *Schiavone* decision was rendered, Justice Powell and Chief Justice Burger have been replaced by Justices Scalia and Kennedy. If the seven justices who registered votes in *Schiavone* still hold the same opinions and both new justices vote to overrule, the *Schiavone* majority would still prevail by a 5-4 decision.

Substitution of the underlined language into the rule would guarantee the certain and consistent results that the Advisory Committee intended to create with the 1966 amendment. Additionally, the proposed clarification would create equitable adjudication of cases on the merits, thereby bringing Rule 15(c) back into line with the general philosophy and goals of the Federal Rules of Civil Procedure.

V. CONCLUSION

Although legal fictions have historically been utilized to satisfy the needs of justice,¹⁹¹ they should never be used to frustrate everyday realities. The reality of *Schiavone* and its progeny is that many defendants who may escape prosecution and potential liability by virtue of current interpretations of Rule 15(c) have received notice of the institution of the action against them well within the allotted time period which would have applied if they were properly named in the original complaint. To assert that Rule 15(c) defendants are somehow prejudiced through a lack of timely notice is a legal fiction. This fiction should not unjustly penalize a plaintiff whose only mistake in pursuing a claim was that the plaintiff, or the plaintiff's lawyer, failed to give notice of the plaintiff's action to the proper defendant prior to the running of the time period at which that defendant, if properly designated or named in the original complaint, would have been legally entitled to notice. Perhaps the Supreme Court or the Rules Committee will consider the gross conceptual and practical inequities which are inseparable from the relation-back doctrine as presently interpreted and rid our legal system of what may be the most unreasonable and harsh example of the exaltation of form over substance which currently exists in our federal scheme of procedural rules.

191. See *Gonzales*, 824 F.2d at 399 (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

